United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12875
CIVIL

ERNEST B. BROWNELL,

Appellant,

vs.

FRED M. MANNING, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana.

APPELLANT'S REPLY BRIEF

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AUTHORITIES CITED

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APPELLANT'S REPLY BRIEF

In responding to the various questions presented by appellee's brief we shall attempt to follow so far as possible the same order in which the questions have been raised in such brief, using wherever possible the subheadings which appear therein.

STATEMENT OF FACTS

Appellee questions the statement that "the other vehicle was some forty feet north of the Martin Lamb driveway when he first started to pay attention to it." We note that in our earlier brief the record page ref-

erence was stated in error as page 50 instead of page 60. The specific evidence of Brownell which prompted the foregoing statement of fact was as follows:

> "Q. How far north of the Martin Lamb driveway is the spot that you have indicated where you first started to pay attention to the other vehicle?
> A. That is 40 feet, according to this" (R. p. 60).

We respectfully submit that the above quoted question and answer must be read in conjunction with the further quotation from the testimony shown on page 2 of appellee's brief.

Plaintiff Drove Nine Miles Over Dangerous Icy Highway to Point of Collision.

It is not disputed that the roadway was covered with snow and ice all the way north from Worland to the bridge but appellant drove his vehicle this distance without incident or mishap. The record does not indicate the extent of traffic on the highway at or about the time of the accident and whatever the number of vehicles appellant may have met in this distance of nine miles there is nothing to show that he encountered any previous difficulty whatsoever in meeting such oncoming vehicles.

We know of no rule of law which would require appellant to be prepared to avoid skids of approaching vehicles as stated at page 5 of appellee's brief.

Drivers Could See Danger Ahead When Vehicles Were 850 Feet to 1,000 Feet Apart and Equi-Distant from Narrow Appearing Bridge.

The writer of appellant's brief and of this reply brief was not present at the time of trial. It does appear from a reading of the Record that there may be ambiguity as to whether the first skid of appellee's truck took place ap-

proximately at the irrigation lateral or when the truck was some 40 feet north of the Martin Lamb driveway. However, it certainly appears to be clear and definite upon any reading or interpretation of the evidence of both drivers that this first skid gave no indication to either driver that the truck would subsequently go out of control. We have sufficiently commented on this phase of the case in our earlier brief.

Plaintiff Must Have Seen Threatening Situation and Possible Danger of Meeting on Bridge.

We must reiterate that both drivers did not anticipate a meeting on the bridge and danger associated therewith.

We quite agree with appellee's insistence at pages 9 and 10 of its brief that the truck could not have been 415 feet from the point of impact and the bus only 185 feet from such point. We again suggest that under the evidence it appears that when the bus was some 185 feet from the point of impact, the truck was 40 feet north of the Martin Lamb driveway, or approximately 270 feet from the point of impact.

There is no basis for the suggestion of counsel at page 10 of appellee's brief that Brownell must have been some distance south of the Piel driveway when he observed the first swerve of the truck. Brownell did not testify that "he could have *turned into* the Piel driveway after observing the swerve." His testimony was as follows:

> "A. Was there any opportunity from the time that you first noticed this other vehicle at the irrigation lateral until the moment of impact for you to get off the road or away from the oncoming vehicle?
>
> A. No.
>
> Q. After the first swerve that was made by the truck would you have had an opportunity to get off the road or to go some place to avoid the oncoming truck?

A. After the first swerve?
Q. Yes.
A. It is possible if I had realized that he was going to get out of control that I could have pulled off right at the Piel driveway, however, I would have been taking a chance of still going into that drainage ditch" (R. pp. 67-68).

Plaintiff Driving at Excessive Speed in View of Dangerous Condition of Highway.

It is true that in the complaint in this action among the various allegations of negligence was asserted the dangerous and excessive speed of the truck. It is fair to conclude from the evidence that the bus had been proceeding for a distance of some nine miles at a speed not too substantially lower than that of the truck. Assuming that both vehicles under existing conditions were traveling at a speed which might be considered excessive the most that can be said is that the speed of the bus was such that when the truck skidded on to and remained on the wrong side of the highway Brownell was not able to bring his vehicle to a stop without colliding with the truck. This matter of excessive speed must be considered in connection with the question of proximate cause. We have referred in the earlier brief to the Wyoming case of *O'Mally v. Eagan,* 43 Wyo. 233, 2 Pac. (2d) 1063, without including specific quotation therefrom. The following quotation from the case of *Stobie v. Sullivan,* 118 Me. 483, 105 Atl. 714, is set forth in the opinion:

> "If each had been on his own side, no trouble would have occurred, as the highway at that point was a state road, straight, wide, smooth, and well wrought. It was not the speed of either party that was the proximate cause of the accident, but the position of one car or the other on that side of the road where it did not belong."

Applying the law to the facts of the case there at bar the Court went on to state:

> "Speed, considered by itself, cannot, accordingly, be said to have necessarily contributed to the accident in question. That is clear when we bear in mind that if the defendant had traveled at a lawful rate of speed, but had started a few minutes earlier, he would have been at the place of accident just the same. The speed, therefore, considered by itself, may have been merely a condition of the accident, and remote in the chain of causation, from which no liability arose."

We cannot appreciate the insistence of counsel for appellee that the case of *Pierce v. Bean,* 57 Wyo. 189, 115 Pac. (2d) 660, is more pertinent than the *O'Mally* case. It is our understanding of the law that whatever conditions may exist at the time of an accident, driving at a speed not reasonable and proper under such conditions is excessive speed. But there is a very substantial difference between the legal obligation of a driver to a vehicle approaching from the opposite direction and the legal obligation of a driver approaching an intersection to another vehicle approaching the same intersection from the cross or intersecting street. The latter was the situation involved in the case of *Pierce v. Bean,* supra.

We previously called attention to the annotation in 77 *A. L. R.* 598 and we shall not lengthen this brief by quoting therefrom. The applicable rules of law involving a vehicle proceeding at an excessive speed which collides with another vehicle on the wrong side of the highway are well defined and we have no argument with the quotations appearing on pages 21 through 23 of the appellee's brief. These various quotations confirm the position taken in our earlier brief that no legal duty devolved upon Brownell until he "either became aware of the

danger or, under the law, should have become cognizant thereof" (p. 15).

We respectfully submit that there is absolutely no evidence in the record upon which a court could say that Brownell was guilty of any negligence in the operation of his bus after it became apparent that the approaching vehicle on the wrong side of the road would not or could not turn back to his right side. Assume for the moment that the bus was being driven at a much lower rate of speed and that as in the case at bar an approaching vehicle skidded out of control on to the wrong side of the highway so closely in front of the bus that even at the much lower rate of speed the bus could not be stopped in time to avoid a collision. In such a case it would have to be conceded that the presence of the vehicle on the wrong side of the highway was the sole proximate cause of the collision. That is exactly the same situation which exists in this case. Whether the vehicles are a short or somewhat longer distance apart when the dangerous condition is created is not material if in fact the dangerous condition arises at a point where because of the speed of the respective vehicles collision cannot be avoided. Speed in such a case is merely a condition of the accident and remote in the chain of causation and it is not the speed of either party that is a proximate cause of the accident but rather the position of one vehicle on that side of the road where it did not belong.

Legal Standards of Care Applicable to Plaintiff's Conduct.

We believe that in both this brief and our earlier brief we have clearly pointed out the several respects in which the trial court appears to have applied erroneous legal principles in reaching his decision.

CONCLUSION

We believe it conclusively appears as a matter of law that the presence of the truck on the wrong side of the highway was the sole proximate cause of this unfortunate accident. If this does not so appear conclusively there is certainly so much doubt and uncertainty as to the propriety of the conclusion reached by the trial court that, in the interest of justice, there should be a new trial on all issues to remove such doubt and uncertainty.

Respectfully submitted,

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